Supreme Court, U.S.
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No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1997

ANTHONY M. DEMARIA AND CATHY L. DEMARIA, HUSBAND AND WIFE; TONY DEMARIA, JR.; AND JOHN JOSEPH DEMARIA, BY AND THROUGH ANTHONY M. DEMARIA, GUARDIAN AD LITEM,

Petitioners,

vs.

WASHINGTON COUNTY; WASHINGTON COUNTY BOARD OF COMMISSIONERS DON STEPHENS, MILDRED HORTON, RONALD POUND; JIM NELSON AND MICHAEL WADLEY; AND WASHINGTON COUNTY BY AND THROUGH THE SHERIFF'S DEPARTMENT OF WASHINGTON COUNTY,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May public law enforcement agencies be held liable under 42 U.S.C. §§ 1983, 1985, and 1986 for failing to protect citizens from the violence of private actors if the victims establish that (1) the public officers acted with "deliberate indifference" and "conscious disregard" toward the victims ***and*** (2) did anything to "ratify, condone, or in any way instigate" the wrongful conduct of the private actors?

2. Did the Ninth Circuit err in affirming the district court's ruling that plaintiffs' evidence had failed to establish triable issues of fact sufficient to defeat defendants' motion for summary judgment on plaintiffs' due process and equal protection claims under 11 U.S.C. §§ 1983, 1985 and 1986?

3. Did the Ninth Circuit err in affirming the district court's exclusion of certain evidence which plaintiffs submitted in opposition to the motion for summary judgment, including evidence which suggested that the perpetrator of private violence, Tom Sorensen, was a state actor, and that defendants conspired against plaintiffs out of ethnic prejudice, destroyed or rejected evidence of Sorensen's culpability, and intimidated witnesses in this action and related state court actions against Sorensen?

4. Did the Ninth Circuit err in affirming the district court's denial of plaintiffs' request to reopen discovery at and after the hearing on defendants' motion for summary judgment?

5. Did the Ninth Circuit err in affirming the district court's denial of plaintiffs' motions for reconsideration of summary judgment and order excluding evidence in opposition to motion for summary judgment?

LIST OF PARTIES

Petitioners in this matter were plaintiffs in the underlying action in the United States District Court, District of Idaho, and appellants in the Court of Appeals for the Ninth Circuit: Anthony M. DeMaria, and Cathy L. DeMaria, Husband and Wife; Tony DeMaria, Jr.; and John Joseph DeMaria, by and through Anthony M. DeMaria, Guardian Ad Litem.

Respondents in this action were defendants in the United States District Court and respondents in the Court of Appeals: Washington County; Washington County Board of Commissioners; Don Stephens, Mildred Horton, Ronald Pound; Jim Nelson and Michael Wadley; and Washington County by and through the Sheriff's Department of Washington County

There are no other known parties in interest.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Anthony M. DeMaria, Cathy L. DeMaria, Tony DeMaria, Jr., and John Joseph DeMaria pray that a writ of certiorari issue to review the memorandum opinion and judgment of the United States Court of Appeals for the Ninth Circuit entered in this matter on November 10, 1997. (App. A, *infra*, 1).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (App. A, *infra*, 1) is not published. The proceedings in the United States District Court for the District of Idaho (App. B and C, *infra,* 6, 21) are not published.

JURISDICTION

The Memorandum disposition of the United States Court of Appeals for the Ninth Circuit (App. A, *infra,* 1) was filed November 10, 1997. Petitioners filed a timely petition for rehearing with suggestion for hearing *en banc* on November 24, 1997. The Ninth Circuit denied the petition for rehearing and rejected the request for hearing *en banc* by unpublished Order on December 31, 1997 (App. D, *infra*, 30).

STATUTES INVOLVED

The pertinent portions of the statutory provisions relevant to resolution of this case are as follows:

42 U.S.C. § 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights,

privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

42 U.S.C. § 1985. Conspiracy to interfere with civil rights

* * * * * * * *

(2) Obstructing justice; intimidating party, witness or juror

If two or more persons in any State or Territory conspire to deter, by force, intimidation, or threat, any party or witness in any court of the United States from attending such court, or from testifying to any matter pending therein, freely, fully, and truthfully, or to injure such party or witness in his person or property on account of his having so attended or testified . . . ; or if two or more persons conspire for the purpose of impeding, hindering, obstructing, or defeating, in any manner, the due course of justice in any State or Territory, with intent to deny to any citizen the equal protection of the laws, or to injure him or his property for lawfully enforcing, or attempting to enforce, the right of any person, or class of persons, to the equal projection of the laws;

(3) Depriving persons of rights or privileges

If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons

within such State or Territory the equal protection of the laws; . . . in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

11 U.S.C. § 1986. Action for neglect to prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the action . . . .

Federal Rule of Evidence 801. Definitions

The following definitions apply under this article:

* * * * * * * *

(d) Statements which are not hearsay. A statement is not hearsay if–

* * * * * * * * *

> **(2) Admission by party-opponent.** The statement is offered against a party and is (A) the party's own statement in either an individual or a representative capacity or (B) a statement of which the party has manifested an adoption or belief in its truth, or (C) a statement by a person authorized by the party to make a statement concerning the subject, or (D) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship . . . .

Federal Rule of Evidence 803. Hearsay Exceptions; Availability of Declarant Immaterial.

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> * * * * * * * * *
>
> **(24) Other exceptions.** A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence. However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity

to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.

Federal Rule of Evidence 104. Preliminary Questions.

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence shall be determined by the court, subject to the provision of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Federal Rule of Civil Procedure 56. Summary Judgment

* * * * * * * * *

(f) When Affidavits are Unavailable. Should it appear from the affidavits of the party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

District of Idaho Local Rule 7.1. Motion Practice

* * * * * * * *

(g) Scheduling. . . . If the motion is to be heard orally, the courtroom deputy will calculate the maximum time allowed for filing a response (14 days), filing a reply (14 days), mailing (6 days), and sufficient time for court review (minimum of 15 days for all dispositive motions).

> The courtroom deputy would then provide the attorney with a date on which to schedule the motion hearing. . . .

STATEMENT OF THE CASE

A. Nature of Case and District Court's Jurisdiction

On March 27, 1993, Tom Sorensen and his son, Kevin Sorensen, who had been threatening to kill Anthony DeMaria and his sons for two years, walked into the DeMarias' front yard and knocked Tony DeMaria, Jr., to the ground. Tom Sorensen, 6 feet tall and 250 pounds, sat on the small teenager's chest and began punching him in the face while Kevin, a heavyweight boxer, kicked the boy in the head and said "he's getting what he deserves." Anthony DeMaria ran out of his house to pull Tom Sorensen off his son. As he looked back at Kevin Sorensen, Kevin hit him across the side of the face and head with a 4' wooden dowel, knocked him to his knees, and struck him repeatedly on his shoulders, neck, and lower back, dragged him around the yard, kneeing and kicking him in the face. The struggle continued for several minutes. After it had concluded, Tom Sorensen came back out of his house with a loaded shotgun and screamed "I'll kill you all." As a result of the beating, Anthony DeMaria suffered permanent physical and emotional injuries, including irreparable trauma to his lower spine, incontinence, and impotence.

From the beginning of their difficulties with the Sorensens in 1991, the DeMarias had sought the assistance and protection of the Washington County Sheriff's Department. Respondents refused to provide those protective services, told the DeMarias to leave the community, and fraternized with and encouraged the Sorensens, even after the dismal and brutal events of March 27, 1993.

On June 29, 1993, petitioners DeMaria initiated the present action by filing a complaint against Washington County,

Idaho, its Sheriff Department, Sheriff Michael Wadley, Chief Deputy Sheriff Jim Nelson, and the County Board of Commissioners for damages under 42 U.S.C. §§ 1983, 1985, and 1986. The district court had subject matter jurisdiction under 28 U.S.C. §§ 1331 and 1343 (a) (1), (2), and (3).

Contrary to respondents' arguments in the district court and before the Ninth Circuit, the DeMarias have not premised this case on the Sheriff's Department's passive indifference or neglect or on the notion that mere knowledge of potential danger imposes upon law enforcement officials an affirmative duty to protect members of the public. Instead, petitioners argued that respondents acted "knowingly" and with "deliberate indifference" and hostility to the DeMarias' situation, that defendants Michael Wadley (Sheriff) and James Nelson (Chief Deputy Sheriff) acted out of ethnic or racial prejudice against the DeMarias as Italian Americans, and that respondents' acts tended to "ratify, condone, or in way instigate" the Sorensens' conduct and were therefore actionable under *Balestreri v. Pacifica Police Dept.* (9th Cir. 1990) 901 F.2 696 as construed by the Second Circuit in *Dwares v. City of New York* (1993) 985 F.2d 94, and by the Eighth Circuit in *Freeman v. Ferguson* (1990) 911 F.2d 423.

B. Factual Background

In late 1990, plaintiff Anthony DeMaria moved to Weiser, Idaho, for the sake of his children and purchased a small house and lot right outside the City limits where he could develop and operate a tannery. Since they lived in the County, the DeMarias were subject to the jurisdiction of the Washington County Sheriff's Department rather than the Weiser City Police.

Cathy DeMaria was born in Weiser and had moved to Montana as a teenager. Her oldest son had progeria, which condemned him to an early death of old age. As the end neared, Cathy decided to take her family back to Weiser for her son's sake. In November 1991, Jason introduced her to DeMaria, whom she married in 1992.

From early 1991 through late 1993, the Anthony DeMaria and his minor sons, John and Tony, Jr., Italian Americans, encountered verbal and physical hostility, ethnic insults ("wop," "dago," "curly haired bastard"), and threats of bodily injury and death from their neighbor, Tom Sorensen.

In 1992, Anthony and Cathy founded a charitable corporation for victims of progeria and arranged for a musical concert in Weiser. In March 1992, they appeared on the Geraldo Show and Geraldo announced his support for the project and intention to appear at the concert in Weiser.

After the telecast of the Geraldo Show in March 1992, Sorensen intensified his abuse. In addition, the DeMarias began to receive anonymous death threats on the phone from self-proclaimed "white supremacists" who were outraged that the DeMarias were bringing "that nigger lover" Geraldo to town, called the DeMarias "fucking wops," and said "we don't like Italians out here."

The Sheriff's Department took no action against Sorensen's verbal and physical abuse of the DeMarias. Instead, commencing in 1991, two years before the beating of March 27, 1993, the Sheriff's Department openly fraternized with and encouraged the Sorensens (e.g,, "is that asshole [Anthony DeMaria] next door causing you trouble?") even when responding to plaintiffs' complaints of violence and intimidation, in contrast to the Department's solicitous treatment of another neighbor whom Sorensen had threatened. In addition, substantial evidence exists that from 1991 through 1993, the Sheriff's Department falsified or altered its telephone logs to omit or minimize plaintiffs' complaints about the Sorensens.

On September 16, 1992, when Anthony DeMaria advised Chief Deputy Sheriff Michael Wadley of a particularly vicious incident, Wadley told him that the Sheriff's Department would not protect him and did not want him in the community.

On September 16, 1992, Deputy Robert Hogg refused to

document Cathy DeMaria's account of Sorensen's brutality and told her not to obtain a restraining order.

In 1992, several members of the Weiser City Police Department began to visit DeMaria at his house, which was just outside the City limits and thus ostensibly outside their jurisdiction. At first DeMaria thought the visits were purely social. After he got to know one of the officers, Mark Sullivan, Mark told him that he and the other police officers were under orders from their "superiors" to inspect the property and tannery for evidence that DeMaria was producing methamphetamines. The district court struck this evidence as hearsay.

As the concert for progeria victims approached in September 1992, DeMaria asked Mark Sullivan and his father, Jerry Sullivan, why the community, the Police Department, and the Sheriff's Department were hostile to the concert and had refused to help the DeMarias with the Sorensens. (Jerry was a dispatcher with the Police Department until November 1992, at which time he joined the Sheriff's Department in the same capacity). The Sullivans told the DeMarias, Michael Connolly and Randy Poston that the Sheriff's Department and Police Department considered DeMaria a "Sicilian Mafia type." Jerry Sullivan said that Wadley and Nelson wanted to drive the DeMarias out of town. Jerry told Cathy DeMaria that some of the officers were prejudiced against people who didn't have "white blood" or who had dark hair or dark skin like DeMaria and his sons. On another occasion, Mark told Cathy that members of the Police and Sheriff's Departments often hung out together and joked about DeMaria's ethnic heritage as a "wop." (Affidavits of Anthony DeMaria, Cathy DeMaria, Michael Connolly, and Randy Poston). The district court struck all of this evidence as hearsay.

After his employment by the Sheriff's Department in November 1992, Deputy Jerry Sullivan told Mike Connolly, a friend of plaintiffs, that the Sheriff's Department refused to protect the DeMarias from the Sorensens and that the Sheriff's Department and Police Department would fire the Sullivans or

"run them out of town" if they helped the DeMarias.

On March 27, 1993, after he arrived at the scene of the beating, Chief Deputy Nelson expressed his sympathy for the Sorensens and hostility towards the DeMarias, e.g., he asked Kevin Sorensen, "did he [Anthony DeMaria] do this to you," and he told the DeMarias, "haven't you had enough, maybe you want to leave town now," "if you don't like it, you can leave town."

The Sheriff's Department's investigation of the beating was incomplete and slanted and grossly departed from the Department's investigative standards. These acts and omissions included Chief Deputy Nelson's planting of a live shell in the DeMarias' rifle and the Department's rejection of a taped statement by Sorensen immediately after the incident.

The Sorensens continued to harass and threaten the DeMarias after the beating on March 27, 1993, threatening to hurt the boys just as they had Anthony DeMaria, laughing about his injuries, building fires outside the DeMarias' windows, wearing camouflage or paramilitary clothing, playing racist skinhead music ("Kill the Monkey," i.e., black people), and brandishing baseball bats, shotguns, and pistols at plaintiffs. Rather than abating this conduct, Chief Deputy Nelson and other officers continued to celebrate and fraternize with the Sorensens even when responding to the DeMarias' complaints of further harassment.

In April and May 1993, after the beating, Deputy Sheriffs Steve Gomez and Marv Williams each told the DeMarias that the Department should have arrested the Sorensens, but that their "boss" (Sheriff Michael Wadley or Chief Deputy Jim Nelson) didn't like the DeMarias and was a friend of the Sorensens. ("they do it their own way out here").

The Sorensens testified at deposition that the Sheriff's Department and its agents, before and after the beating, *never* reprimanded them for their conduct or told them to stop

harassing the DeMarias.

On July 8, 1993, approximately one week after the DeMarias filed this action, Sheriff Wadley advised Jerry Sullivan, an employee of the Sheriff's Department, and his son Mark Sullivan, a police officer, that they were under suspicion for burglarizing a pharmacy in Weiser. The investigation lasted until April 1995, after the DeMarias' criminal trial against Tom Sorensen. During the investigation, in October 1993 and February 1994, Jerry Sullivan advised the DeMarias of the investigation, consulted their initial attorney for his own defense, and told the DeMarias that he was now "in the same boat" as they were and that he and his son, Mark, could not help them in this or related cases for fear of losing their jobs or being convicted of the crime.

On February 8, 1994, Mark Sullivan came to Baker City, Oregon, and told the DeMarias that Nelson rejected certain information at the scene on March 27, 1993, and that Wadley had rejected Sullivan's written report and destroyed Sullivan's tape recording of Sorensen's statements of premeditated intent to hurt and kill the DeMarias. Sullivan also stated that Nelson had been outraged that the dispatcher, Becky DeYoung, had sent the Police Department to the scene before the Sheriff's Department. The district court struck all of this evidence as hearsay.

At his deposition, Nelson admitted having talking to DeYoung the day after the fight on this subject. In his deposition, Mark Sullivan denied some of his alleged statements on February 8, 1994, but corroborated several details which the DeMarias could only have learned from him. Sullivan admitted that Nelson had told him not to enter the house because DeMaria was allegedly armed. Sullivan also admitted that he had taped Sorensens' statements, but could not now remember those statements. Sullivan testified that he had offered the tape to Deputy Hogg at the hospital (rather than Sheriff Wadley at the Department), but that Hogg had not accepted it. Sullivan claimed that he had lost or misplaced the

tape, despite the DeMarias' request that he preserve it after he mentioned it to them on February 8, 1994. He also testified that he was almost certain he had prepared a written report of the incident, because that was his practice, but had probably destroyed the report in 1994.

On July 11, 1994, after the DeMarias had moved to Oregon, Deputy Nelson told Craig Davidson of the Idaho Crime Victims Program that "we've been sued by this DeMaria guy" and that "we had him under surveillance and investigation for allegedly producing methamphetamines and controlled substances. He used the tanning business as a front because they can use the same chemicals for tanning hides as they do for making methamphetamines. We were close to getting a warrant issued when he moved." (Affidavit of Craig Davidson). The district court struck this affidavit as untimely and as lacking probative value. In their responses to plaintiffs' demand for production (August 1995) and at their depositions in February 1996, defendants had denied that they had DeMaria under surveillance, that they had communicated with other law enforcement agencies about him, that they had him under criminal investigation, or that they had heard "from any source" that he was manufacturing illegal drugs on his property.

As plaintiffs argued in the district court and before the Ninth Circuit, proof of conspiracy and wrongful conduct by state officers is necessarily and unavoidably circumstantial.[1] The fact that some of these events occurred after the beating of March 27, 1993, does not diminish their probative value. Instead, this

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[1] See, generally, *Adickes v. S.H. Kress and Company* (1970) 398 U.S. 144, 26 L.Ed.2d 142, 90 S.Ct. 1508, 1608, 1609, and the concurring opinion of Justice Black at 1618; *Hampton v. Hanrahan* (7th Cir. 1979) 600 F.2d 600, 620-623, *revd. in part on other grounds*, 446 U.S. 754, 64 L.Ed.2d 670, 100 S.Ct. 1987, *rehearing denied*, 448 U.S. 913; *Lenard v. Argento* (7th Cir. 1983) 699 F.2d. 874, 882-883, *cert. denied*, 464 U.S. 815, 782 L.Ed.2d 84, 104 S.Ct. 69, *disapproved on other grounds, Hensley v. Eckerhardt* (1983) 461 U.S. 424, 76 L.Ed.2d 40, 103 S.Ct. 1933.

evidence confirms respondents' pre-existing wrongful intentions and conduct, explains their other (allegedly "passive") conduct as part of a larger pattern of affirmative abuse, and supports petitioners' claims for damages ***after*** the beating, e.g., the physical and emotional distress they suffered from that date through the date of their departure from Idaho in October 1993.

C. Procedural History

On July 30, 1993, defendants filed a motion to dismiss the Complaint under Federal Rule of Civil Procedure 12 (b) (6) on the grounds that it failed to state a claim for relief because defendants had no affirmative duty to protect plaintiffs from private violence under *DeShaney v. Winnebego County Social Services* (1989) 489 U.S. 189, 195, 109 S.Ct. 998, 103 L.Ed.2d, 249, and *Balistreri, supra,* 901 F.2d 696, 701.

On March 9, 1994, the district court granted defendants' motion to dismiss, but gave plaintiffs leave to re-plead all of their claims for relief. On March 28, 1994, plaintiffs' original Idaho counsel, Stephen Pierce, filed an Amended Complaint which alleged deliberate indifference and discriminatory intent by defendants. Shortly thereafter, Pierce's license was suspended by the Idaho Supreme Court for acts of malfeasance and he ceased to represent or communicate with plaintiffs. At the same time, plaintiffs' original California counsel ceased to represent or communicate with them because of his own personal and financial problems.

Plaintiffs did not obtain responsible and effective Idaho counsel until November 1995. On December 28, 1995, the parties filed a ***joint*** motion to continue trial date from March 12, 1996, to a date after September 1996, so that they could conduct discovery and evaluate the case. On January 17, 1996, Judge B. Lynn Winmill, who had recently taken over the case, continued the trial to April 30, 1996, and ordered the parties to complete their discovery within four weeks (by February 23, 1996), file their dispositive motions by February 29, 1996, and appear for a hearing on the dispositive motions

on March 21, 1996, i.e., 21 days after the filing of the motion rather than the 49 days contemplated by Idaho District Rule 7.1 (b).

Defendants filed a motion for summary judgment on February 29, 1996, on the same grounds as their motion to dismiss in July 1993. On March 20, 1996, defendants filed a motion to strike as hearsay substantial portions of the opposition affidavits of Anthony DeMaria, Cathy DeMaria, Randy Poston, and Michael Connolly which described (1) defendants' ethnic prejudice against Anthony DeMaria as a "Sicilian Mafia type," (2) the Sheriff's Department's conspiracy with the Weiser Police Department--under the guise of a joint criminal investigation of the DeMarias for manufacture of methamphetamines-- to harass and drive the DeMarias from the community, (3) defendants' concealment, destruction, and rejection of evidence of Tom Sorensen's culpability on March 27, 1993, and (4) defendants' intimidation of the witnesses (Mark and Jerry Sullivan) who had provided this information to the affiants in 1992 and 1993, which induced the Sullivans not to assist plaintiffs in their state court civil and criminal cases against the Sorensens and their federal civil rights action against defendants.

In response to the motion to strike, petitioners' counsel contacted Craig Davidson of the Idaho Crime Victims Program in Caldwell, Idaho, to obtain an rebuttal affidavit which corroborated plaintiffs' claims that Deputy Nelson had failed to investigate or had concealed material facts about the beating and that the Sheriff's Department had DeMaria under surveillance in 1993 for suspected criminal activity, a fact which defendants had consistently denied at their depositions in February 1996 and response to plaintiffs' demand for production of documents in August 1995.

At the hearing on March 22, 1996, plaintiffs argued that Davidson's Affidavit confirmed the DeMarias' and their witnesses' recollection of the Sullivans' description of collusive activity by the Police and Sheriff's Department in 1992 and

1993, suggested that defendants had abused the discovery process in concealing and denying this surveillance; and plaintiffs asked that discovery be reopened on these issues, which implicated Sorensen as a voluntary or paid state agent. The court struck the affidavit as untimely and as lacking probative value, denied plaintiffs' request for time to correct the evidentiary defects in their affidavits, and promptly filed its Memorandum Decision and Judgment which granted the motion for summary judgment and defendants' motion to strike. (App. B, *infra,* 6).

On April 5, 1996, plaintiffs filed motions to reconsider the summary judgment and order excluding evidence. The District court denied these motions and entered judgment on June 6, 1996. (App. C, *infra*, 21).

D. Bases for Appeal

The DeMarias appealed the district court's decisions on five grounds:

1. Public Officers' Liability for Private Violence: As a general rule, members of the public have no constitutional right to sue state employees who fail to protect them against harm inflicted by third parties. *DeShaney, supra,* 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249. However, the Ninth Circuit has established and other Circuits have elaborated a "danger creation" exception which imposes liability upon public offices under 42. U.S.C. § 1983 when (1) the public officers acted with "deliberate indifference" to the victims and/or (2) committed acts which "ratified, condoned, or in any way instigated" or enhanced the conduct of the private actor. E.g., *Balistreri, supra,* 901 F.2d at 700; *L. W. v. Grubbs* (9th Cir. 1992) 974 F.2d, 119, 121, *cert denied*, 508 U.S. 951, 113 S.Ct. 2442, 124 L.Ed.2d 660; *Freeman, supra,* 911 F.2d at 53, 54-55; *Dwares, supra,* 985 F.2d at 98-99.

2. Triable Issues of Fact: Plaintiffs' evidence in opposition to defendants' motion for summary judgment satisfied

the criteria of these exceptions to the *DeShaney* rule or at least created triable issues of fact which precluded summary judgment.

3. Exclusion of Evidence: The trial court abused its discretion and substantially prejudiced plaintiffs opposition to the motion for summary judgment by granting defendants' motion to strike:

(a) Substantial portions of four affidavits which recounted the Sullivans" description of defendants' ethnic animus against plaintiffs, conspiracy to drive them from the community, destruction, rejection and concealment of evidence of the Sorensens' culpability, and intimidation of the Sullivans into recanting their statements and refusing to assist plaintiffs in this case and related state court actions against the Sorensens, including the criminal prosecution of Tom Sorensen. The evidence was admissible as the admissions of a party opponent or under the "catch-all" exception to the hearsay rule. FRE 801 (d) (2) (D) & 803 (24).

(b) The affidavit of Craig Davidson--which detailed Deputy Nelson's refusal to investigate the beating and admission to Davidson that the Sheriff's Department had the DeMarias under surveillance at the time of the beating--suggested that Sorensen may have been acting as a state agent. The evidence was admissible as the admission of a party opponent and disclosed that defendants had abused the discovery process in this case by concealing these facts at deposition and in response to plaintiffs' requests for

documents. The district court abused its discretion and substantially prejudiced plaintiffs by striking the affidavit as untimely and as lacking probative value.

4. Refusal to Reopen Discovery: The circumstances of this case, including plaintiffs' lack of competent counsel until late 1995, the court's accelerated discovery and motion schedule, defendants' concealment of material evidence and intimidation of witnesses, established that the district court abused its discretion by failing to permit plaintiffs to rectify the alleged deficiencies in their affidavits and to reopen discovery on the issues of surveillance and related issues.

5. Denial of Motions for Reconsideration: The same factors suggest that the court abused its discretion by failing to grant plaintiffs' motions for reconsideration of summary judgment and order excluding evidence.

E. The Ninth Circuit's Ruling

In its Memorandum decision (App. A, *infra*, 1), the Ninth Circuit ruled that:

1. Due Process Claims: The "danger creation" exception to *DeShaney* required affirmative conduct by the state actor, which placed plaintiffs in danger; the "threshold" for this exception required Washington County's "control" over the DeMarias or Sorensens; and plaintiffs had provided no evidence that Washington County informed the Sorensens that the DeMarias would go unprotected.

2. Equal Protection Claims. The DeMarias' equal protection claim failed because it rested entirely on the hearsay statements in the four affidavits which the district court had stricken, which were not admissible as statements of agents under Fed. R. Evidence 801 (d) (2) (D) or under Fed. R. Evid. 803 (24), the "catch-all" exception to the hearsay rule.

3. **Exclusion of Evidence.** The district court did not abuse its discretion in striking the affidavit of Craig Davidson, which was filed on the morning of the hearing.

4. **Reopening Discovery.** The district court did not abuse its discretion in denying plaintiffs' request to correct the deficiencies in their affidavits or conduct additional discovery, because the motion was not made prior to the hearing.

5. **Motions for Reconsideration.** The district court did not abuse its discretion in denying plaintiffs' motions for reconsideration of the orders striking evidence and granting summary judgment.

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's Construction of the "Danger Creation" Exceptions to the *DeShaney* Rule Conflicts With the Second and Eighth Circuits' Construction of Those Exceptions in *Dwares* and *Freeman*

In its Memorandum Decision, the Court failed to address plaintiffs' substantive argument that public law enforcement agencies may be held liable under 42 U.S.C. § 1983 for failing to protect citizens from the violence of private actors if the victims establish that (1) the public officers acted with "deliberate indifference" and "conscious disregard" towards the victim ***and*** (2) committed acts or omissions which tended to "ratify, condone, or in any way instigate" the wrongful conduct of the private actors. In presenting this argument, appellants specifically asked the Court to address and resolve the apparent conflict between the Ninth Circuit and the Second and Eighth Circuits in *Balestreri, supra*, 901 F.2 696, *Dwares, supra,* 985 F.2d 94, and *Freeman, supra,* 911 F.2d 423. Other Circuits and certain state courts of appeal have observed the lack of uniformity and definition on these issues. E.g, *Wyke v. Polk* (11th Cir.1997) 129 F.3d 560, 567 ("Exactly what kind of state action fits within that exception has been the subject of

considerable debate since *DeShaney*"); *Henderson v. Gunther* (Colo. 1997) 931 P.2d. 1150, 1158-1159; *Henderson v. Romer* (Colo.App. 1995) 910 P.2d. 48, 56-57 (dissenting opinion).

Accordingly, certiorari would be appropriate in order to resolve a conflict among the Circuit Courts of Appeal on a matter of substantial public importance. Supreme Court Rule 10 (a), (c).

B. The Ninth Circuit's Review of the District Court's Evidentiary and Procedural Rulings So Far Departed from the Accepted and Usual Course of Judicial Proceedings, or Sanctioned Such a Departure by the District Court, As to Call for an Exercise of the Supreme Court's Supervisory Power

If this Court determines that a writ of certiorari should be issued to the Ninth Circuit in regard to its construction of the exceptions to the *DeShaney* rule, petitioners respectfully request that the Court also review the procedural and evidentiary issues decided by the Ninth Circuit in this case, either pursuant to Supreme Court Rule 10 (a) (departure from accepted and usual course of judicial proceedings) or as an incident of this Court's right under Rule 24 (a) to consider plain error evident from the record and otherwise within its jurisdiction to decide.

These procedural and evidentiary issues include:

1. The Ninth Circuit's misapprehension or disregard of plaintiffs' evidence that Washington County committed affirmative acts which created or substantially increased the dangers which plaintiffs faced from their neighbors, the Sorensens. These events denied the DeMarias the protective services available to other member of the community (e.g., their other neighbor, Terry Fritts) and led the Sorensens to believe that it was "open season" on the DeMarias. Plaintiffs identified this evidence, with specific citation to the record, in their Opening Brief, Reply Brief , and Petition for Rehearing to the

Ninth Circuit, including the evidence summarized in this Petition.

2. The admissibility of Jerry Sullivans' and Mark Sullivans' descriptions of anti-Italian prejudice, the Police Department's and Sheriff's Department's alleged conspiracy against the DeMarias, and the Sheriff's Department's intimidation of the Sullivans after the beating of March 27, 1993, either as nonhearsay (admissions by agents) or under the "catch-all" exception to the hearsay rule.

3. The admissibility of Craig Davidson's affidavit, which was filed in rebuttal to defendants' motion to strike evidence (itself received shortly before the hearing on the motion for summary judgment), particularly his recollection of Chief Deputy Jim Nelson's admission, a year after the beating, that the Sheriff's Department had the DeMarias under surveillance in 1992 and 1993.

4. The district court's denial of plaintiffs' request for leave to correct the alleged deficiencies in their affidavits and to reopen discovery on certain issues (e.g., evidence of surveillance of the DeMarias by respondents and other law enforcement entities), and denial of plaintiffs' ensuing motions for reconsideration of the orders excluding evidence and granting summary judgment.

ARGUMENT

A. The Ninth Circuit Failed to Address the Elaboration of the Exceptions to the *DeShaney* Rule in Ninth Circuit Decisions After *Balestreri* and in Related Decisions by the Second and Eighth Circuits

In its Memorandum decision, the Ninth Circuit did not respond to petitioners' request that it reconcile or explain the apparent conflict between the Ninth Circuit and the Second and Eighth Circuits in the construction and application of the phrase "ratify, condone, or in any way instigate" in *Balestreri, supra,*

901 F.2d. at 121; *Freeman, supra,* 911 F.2d. at 53-55; *Dwares, supra,* 985 F.2d at 98-99. Instead, the Ninth Circuit completely ignored these principles and precedents and narrowly held that Washington County could not be held liable for due process violations under 42 U.S.C. § 1983 because it did not "control" the DeMarias or the Sorensens.

In their motion for summary judgment in the district court, defendants argued that plaintiffs had failed to plead or prove a due process or equal protection claim under 42 U.S.C. § 1983, because the state has no affirmative duty to protect its citizens against the violence of private actors. Defendants contended that plaintiffs had created no triable issues of fact on whether the Washington County had (1) placed plaintiffs in custody and diminished their ability to protect themselves or (2) created the danger which led to plaintiffs' injuries.

In its Memorandum Decision, the district court adopted these arguments and concluded that the DeMarias at best contended that mere knowledge or suspicion of danger by law enforcement officials imposed on them an affirmative duty to protect citizens from violence from private actors. Having framed the case in this fashion, the court held that the DeMarias' claims fell squarely within the rule of *DeShaney* and its progeny in the Ninth Circuit, which hold that public officers' mere knowledge or passive inactivity, without more, is not actionable under § 1983.

Although the district court addressed several of the cases cited by the parties, it failed to apply language from post-*DeShaney* decisions in the Ninth and other Circuits which define and elaborate the "danger creation" exception to the *DeShaney* rule which the Ninth Circuit articulated in *Grubbs, supra,* 974 F.2d at 121. These cases suggest that plaintiffs may preserve due process claims under § 1983 if they plead or prove that defendants acted with "deliberate indifference," "conscious disregard," or malice towards plaintiffs ***and/or*** did "*anything*" to "ratify, condone or in any way instigate" the abuses of the private actor. E.g., *Balistreri, supra,* 901 F.2d at 700; *Freeman,*

supra, 911 F.2d at 53-55; *Dwares*, *supra*, 985 F.2d at 98-99.

"Deliberate indifference," "conscious disregard," and "malice" focus our attention upon the relationship, whether "special" or otherwise, ***between the state and the victim***. In contrast, the words "ratify, condone or in any way instigate" emphatically direct us to the relationship ***between the State and the perpetrator***. At one end of this range of relationships, the culprit will be shown to have acted as an employee or direct agent of the State, in essence, a state actor. Such a scenario emerged in the present case shortly before the hearing of March 22, 1996, as a result of plaintiffs' discovery that Chief Deputy Nelson, in the private conversation with Craig Davidson in 1994, stated that the Sheriff's Department had DeMaria under criminal investigation and surveillance in 1993 (evidence which the district court struck). If that surveillance took place, it accounts for many of Chief Deputy Nelson's and Deputy Hogg's visits to Sorensen in 1991, 1992, and 1993, implicates Tom Sorensen in the scheme as a paid or voluntary informant, and explains why Nelson and Wadley attempted to conceal the surveillance in their depositions and responses to plaintiffs' written discovery in this action.

At the other end of the same spectrum of "danger creation," more tenuous relationships, including fraternization with the perpetrator by a senior law enforcement officer and the officer's deliberate or callous indifference to the victim, will establish similar liability under § 1983. E.g., *Freeman* and *Dwares*, *supra*.

In short, *Balestreri* and its progeny in other Circuits suggest that the district courts should engage in a twofold analysis of the "danger creation" exception to *DeShaney* in order to determine whether State action in connection with private abuse is actionable under §§ 1983 and 1985, i.e., (1) proof or pleading of malicious or deliberate indifference towards the plaintiff and (2) any affirmative acts by the public officers with ratify, condone or "in any way" instigate the private actor's conduct. Both elements exist in the present case.

These views are perfectly consistent with *DeShaney*. The United States Supreme Court found no evidence of deliberate indifference or malice by the State agents with responsibility for Jason. Instead, the State actors were attempting to help the boy and had no duty to protect him from his father. In addition, the case does not disclose any evidence that the State agents fraternized with, sympathized with, or in any ratified, condoned, or instigated the father's abusive conduct. In fact, as the Supreme Court repeatedly pointed out, plaintiffs ***conceded*** that the State agents had "played ***no part*** in creating" the hazards to which the boy was exposed. 109 S.Ct. 998, 1004, 1006. "The ***most*** that can be said of the State functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them." 109 S.Ct. at 1007 (emphasis added).[2]

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[2] Respondents rejected plaintiffs' arguments on "deliberate" and malicious indifference, including the deliberate withholding of public services from the DeMarias, and insisted that the government's "mental state" is irrelevant and that the only relationship which a court may consider is that between the governmental actors and the victim. In contrast, the United States Supreme Court and the Courts of Appeals have long held that the government agents' "mental state" and "deliberate indifference" to the victim will give rise to liability under 28 U.S.C. § 1983. E.g, *Daniels v. Williams* 474 U.S. 326, 88 L.Ed.2d 662, 106 S.Ct. 662, 664-665, 666, and footnote 3 ("deliberate" vs. negligent conduct); *Adickes v. S.H. Kress and Company* (1970) 398 U.S. 175, 90 S.Ct. 1598, 1616 (*"intentionally tolerating violence or threats of violence"*); *DeShaney*, 109 S.Ct. at 1002, 1007 ("the *most* that can be said . . . is that they stood by and did nothing", and footnote 10); *Grubbs*, *supra*, 974 F.2d at 121-123 ("knowingly" assigned to work, *"mental state" beyond "mere negligence," "official deliberate indifference"*); *Wood v. Ostrander* (9th Cir. 1989) 879 F.2d. 583, 587, 588, and footnote 4 ("deliberate indifference"), *cert denied*, 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305; *Hammond v. County of Madera* (9th Cir. 1988) 859 F.2d. 797, 803; *Johnson v. Dallas Independent School Dist.* (5th Cir. 1994) 38 F.3d 198, 201, *cert denied*,514 U.S. 1017, 115 S.Ct. 1361, 131 L.Ed.2d 218 ("culpable knowledge and conduct," "defendants must have been at least

(continued...)

In the present case, plaintiffs DeMaria presented evidence which a reasonable person could logically conclude exhibited the Sheriff's Department's and its senior officers' deliberate and malicious indifference to DeMarias' situation or, at the minimum, created triable issues of fact on these subjects. Unless the district court could conclusively and completely extinguish the possibility of "deliberate indifference" by the Sheriff's department, it could not resolve these issues of intent and culpability without testing the demeanor and credibility of the witnesses. "When reasonable persons may disagree as to whether particular conduct constitutes negligence, gross negligence or recklessness, the question is one of fact to be decided by a jury." *Daniels, surpa,* 474 U.S. at 334-35, 106 S.Ct. at 666-67; *Wood, supra,* 879 F.2d at 588 and fn. 4.

Respondents cited no cases on the second aspect of plaintiffs' analysis of the "danger creation" exception, the special relationship ***between the State and the perpetrator*** of violence or abuse. The only relevant authorities before the district court and Ninth Circuit on these subjects were identified and put forward by plaintiffs. *Freeman* and *Dwares* each develop and apply the language propounded by the Ninth Circuit in *Balistreri* ("ratified, condoned or in any way instigated"). Both cases bear remarkable similarities to the present case.

In *Freeman*, plaintiffs' complaint in the trial court alleged that defendant Police Department had deliberately and indifferently refused to protect the decedent from the attacks of her husband, who eventually killed her. In addition, the Complaint suggested that the Police Chief was a close friend of the perpetrator and, as a result, had failed to carry out his duties in the case. On appeal, ***for the first time***, plaintiffs counsel elaborated this fact of the parties' friendship in a fashion which

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[2](...continued)
deliberately indifferent to the plight of the plaintiff") (emphases added).

the Court of appeal found sufficient to state a cause of action under *DeShaney*. On appeal, the attorney suggested that the murderer had been a "close bosom buddy" of the Chief and had visited him at home and at work and that plaintiffs could "probably" show that ***occasionally the Chief instructed his officers not to intervene in the husband's domestic abuse***. 911 F.2d at 54. From these allegations the Court concluded that the violence which led to the decedent's death was not solely private action, but was also the result of "an affirmative act by a State actor to ***interfere with the protective services which would otherwise have been available*** in the community" and that such conduct might ratify or condone the private actions. 911 F.2d at 54 (emphasis added). The Court did could not rule conclusively on these facts, however, because plaintiff had not yet alleged them in her complaint on the trial level.

The DeMarias also relied on *Dwares, supra*, 985 F.2d 94, in which the plaintiff alleged that the Police conspired with skinheads to permit them to beat up some flag-burners and assured the skinheads that, unless they got totally out of control, they would not be impeded or arrested. In the present case, the district court stated that the facts are "much different" because the Sorensens' abuse started well before any official sanctions. The court admitted that the Sorensens may have continued the abuse because they met no resistance from the Sheriff, but the district court found that probability to be simply another instance *of DeShaney's* rule that the State will not be liable if its functionaries "stand by and do nothing."

Petitioners argued to the Ninth Circuit that the district court's construction of *DeShaney* and *Freeman* did not do those decisions complete justice. The Supreme Court in *DeShaney* prefaced its statement about police who stand by and do nothing with the phrase that this inactivity was "The ***most*** that can be said of the state functionaries." Moreover, the fact that the Sorensens ***may*** have commenced their abuse ***before*** they gained the Sheriff's Department's affection and support does not exonerate the Department of liability. The

words "ratify" or "condone," which *Freeman* and *Dwares* borrowed from *Balistreri,* necessarily imply that the violence and abuse have begun before any involvement by the law enforcement officers.

The Ninth Circuit considered none of these arguments and did not even comment on *Dwares* or *Freeman.* Accordingly, petitioners respectfully request that this Court issue a writ of certiorari to the Ninth Circuit and thereafter review and determine these matters in order to establish a uniform and consistent construction of the exceptions to the *DeShaney* rule on the liability of public officers for the violent conduct of private actors.

B. If This Court Issues a Writ of Certiorari on These Substantive Issues, It Should Also Revisit and Review the Ninth Circuit's and the District Court's Evidentiary and Procedural Rulings

The basis for review of these procedural and evidentiary rulings was stated in plaintiffs' Petition for Rehearing, which the Ninth Circuit denied on December 31, 1998. (App. D, *infra*, 30).

Briefly stated, review would be appropriate for the following reasons.

1. Triable Issues of Fact. Even without regard to the evidence excluded by the district court, plaintiffs submitted evidence of affirmative conduct by the Sheriff's Department and its agents which denied plaintiffs the protective services available to other members of the community and encouraged, condoned and ratified the Sorensens' abuse of the DeMarias, as summarized in this Petition.

2. Admissibility of Statements Attributed to Jerry Sullivan and Mark Sullivan. The Ninth Circuit affirmed the district court's ruling that these statements were not admissible as the admissions of a party's agent or under the catch-all exception to the hearsay rule. The Ninth Circuit found that no

evidence established that the Police Department, Mark Sullivan's employer, was investigating the DeMarias for the manufacture of methamphetamines, and that all of Jerry Sullivans' comments about the Sheriff's Department's conduct towards plaintiffs occurred before he was employed by the Sheriff's Department. These rulings were not supported by the record on appeal or in the district court.

First, Anthony DeMaria stated that Mark Sullivan told him in 1992 that his superiors had sent him to the DeMarias' property to investigate the DeMarias for the production of methamphetamines. As respondents' counsel stated at the hearing before the Ninth Circuit, *United States v. Jones* (9th Cir. 1985) 766 F.2d 412, 415, which held that an agent's statements could not in themselves establish the agency, has been overruled by *Hilao v. Estate of Marcos* (9th Cir. 1996) 103 F.3d 767, 775. As stated above, Sullivans' alleged statement was subsequently corroborated by another public official, Craig Davidson, in regard to the Sheriff's Department's role. Absent Sullivans' statements in 1992, how would the DeMarias have independently learned that they were the subject of such surveillance?

Second, Jerry Sullivan made several statements about the Sheriff's Department's refusal to help the DeMarias and its intimidation of the Sullivans after November 1992 (and March 27, 1993).

Third, with reference to the catch-all exception to the hearsay rule, the record below clearly demonstrates that the trial court applied the criminal rather than the civil standard of admissibility, by relying upon "inherent" rather than "circumstantial" indicia of trustworthiness and by ruling that the court was "absolutely" barred from considering the evidence (rather than having "a fair degree of latitude" to consider it in a civil case). Contrast the district court's own authority, *U.S. v. Valdez-Soto* (9th Cir.1994) 31 F.3d 1467, 1472, *cert denied,* 514 U.S. 1113, 115 S.Ct. 1969, 131 L.Ed.2d 859, which distinguishes the civil and criminal standards for admitting such

evidence.

3. Admissibility of Affidavit of Craig Davidson. The Ninth Circuit affirmed the district court's exclusion of this Affidavit on the grounds that it was untimely under the local rules. In fact, the district court had severely abbreviated the time specified in the local rules for briefing and hearing a motion for summary judgment (i.e., by reducing the time specified in Local Rule 7.1 from 49 days to 21 days,). Moreover, the Affidavit was intended as rebuttal to defendants' Motion to Strike, which had been received by plaintiffs' California counsel the day before the hearing (the afternoon before the filing of the Affidavit). Nonetheless, defendants' counsel had time before the hearing to review the document and discuss it with his client, so that he suffered no prejudice.

Plaintiffs submitted the Affidavit for three reasons: (1) as substantive evidence that the Sheriff's Department had the DeMarias under surveillance for the manufacture of methamphetamines in 1992 and 1993, which suggested that the Sorensens may have been acting as paid or voluntary state agents; (2) as corroborative evidence of the Sullivans' statements on these subjects and the alleged conspiracy between the Sheriff's and Police Departments, which defendants had moved to strike; and (3) as evidence of defendants' abuse of the discovery process (sworn denials of surveillance at deposition and in response to document demands), which would justify reopening discovery.

The Ninth Circuit did not consider any of these facts or the materiality of the Affidavit in affirming the district court's exclusion of the Affidavit. Nor did the district court. ("I don't know how significant it is").

4. Denial of Requests to Correct Evidentiary Deficiencies, Reopen Discovery, and Reconsider Orders Excluding Evidence and Granting Summary Judgment. The circumstances of the case and the interests of justice mandated that the district court grant plaintiffs' requests for leave to

correct the alleged deficiencies in their affidavits, reopen discovery (at least on the issues of surveillance of the DeMarias), and plaintiffs' motions for reconsideration of the court's orders which excluded substantial portions of plaintiffs' affidavits and granted defendants' motions for summary judgment.

CONCLUSION

This Court should issue a writ of certiorari to the Ninth Circuit in order to establish a uniform construction of the "danger creation" exceptions to the *DeShaney* Rule. In addition, the interests of justice and the record in the present case merit the Court's review of the Ninth Circuit's affirmation of the district court's evidentiary and procedural rulings in this matter.

Respectfully submitted,

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APPENDICES

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[Filed November 10, 1997]

ANTHONY M. DEMARIA and CATHY L. DEMARIA, husband and wife; TONY DEMARIA, JR.; and JOHN JOSEPH DEMARIA, by and through ANTHONY M. DEMARIA, Guardian Ad Litem, Plaintiffs/Appellants, v. WASHINGTON COUNTY; WASHINGTON COUNTY BOARD OF COMMISSIONERS DON STEPHENS, MILDRED HORTON, RONALD POUND; JIM NELSON and MICHAEL WADLEY; JOHN DOES 1 THROUGH 10; and WASHINGTON COUNTY by and through the SHERIFF'S DEPARTMENT OF WASHINGTON COUNTY, Defendants–Appellees	No. 96-35851 MEMORANDUM*

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

Appeal from the United States District Court
for the District of Idaho
B. Lynn Winmill, District Judge, Presiding

Argued and Submitted October 10, 1997
Seattle, Washington

Before: SKOPIL and TROTT, Circuit Judges, and ROLL, District Judge.**

Plaintiffs Anthony DeMaria and his family appeal the district court's grant of summary judgment in favor of defendants Washington County, Idaho, and County officials (collectively "Washington County") in the DeMarias' 42 U.S.C. § 1983 action alleging violations of their due process and equal protection rights. The DeMarias also appeal several other district court rulings with regard to the admissibility of affidavits and the reopening of discovery. For the reasons stated below, the district court's rulings are affirmed.

The DeMarias claim that Washington County violated their civil rights under the Due Process Clause by failing to protect the DeMarias from the Sorensens' harassment. However, the relevant case law holds that the state is not liable under the Due Process Clause for failing to protect its citizens from private parties unless the state has affirmatively created the dangerous situation, or has limited, through incarceration or other means, the citizen's ability to act in his or her own defense. See DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 201 (1989); Balistreri v Pacifica Police Dep't, 901 F.2d 696, 699-700 (9th Cir. 1990).

The DeMarias argue that the "danger creation" exception to DeShaney applies. This exception requires affirmative conduct on the part of the state actor, thereby placing the plaintiff in a position of danger. L.W. v. Grubbs, 974 F.2d 119,

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** The Honorable John M. Roll, District Judge for the District of Arizona, sitting by designation.

121 (9th Cir. 1992); Wood v. Ostrander, 879 F.2d 583, 589-90 (9th Cir. 1989). This case does not reach the threshold of the "danger creation" exception because Washington County did not control either the DeMarias or the Sorensens. Additionally, no evidence exists that Washington County informed the Sorensens that the DeMarias would go unprotected. Summary judgment is appropriate on the Due Process Clause claim.

The DeMarias also argue that, because of their Italian heritage, Washington County denied them their civil rights under the Equal Protection Clause. An Equal Protection claim can be made based on a citizen having been denied effective police protection because he or she is Italian. Benigni v. City of Hemet, 879 F.2d 473, 477-78 (9th Cir. 1988).

The DeMarias' Equal Protection proof of Washington County's discriminatory motivation rests entirely upon certain hearsay statements in four affidavits. Once the district court ruled that these statements were inadmissible, it necessarily found that "there is no evidence in the record indicating that the Defendants had a discriminatory motivation." That ruling is correct.

The four affidavits contained statements that the district court determined to be "rank hearsay." These four affidavits were from people who purportedly heard Mark and Jerry Sullivan say that they had heard other people make the offending statements. Mark and Jerry Sullivan were subsequently deposed in this action and denied that they ever made the statements attributed to them by affiants.

The district court's ruling on the admission of evidence is reviewed for abuse of discretion. United States v. Gilbert, 57 F.3d 709, 711 (9th Cir. 1995).

The DeMarias argue that the Sullivans' purported statements are admissible under Fed. R. Evid. 801(d) (2) (D) as statements made by agents, or under Fed. R. Evid. 803(24), the "catch-all" exception to the hearsay rule.

A statement is not considered hearsay if it is made "by the party's agent or servant concerning a matter within the scope of the agency or employment, [and if it is] made during the existence of the relationship." Fed. R. Evid. 801(d)(2)(D). Because there is no evidence that Mark Sullivan's employer, the Weiser Police Department, was investigating the DeMarias, he could not be considered to have made the alleged statements within the scope of his employment.

The DeMarias argue that Jerry Sullivan was an agent of Washington County because he was an employee of the County. Jerry Sullivan did not become an employee of Washington County until November 1992. The alleged comments made by Jerry Sullivan were apparently made prior to November 1992. In any event, the Sullivans were not "agents" of Washington County when they engaged in after-hour conversations with the DeMarias and others. The district court did not abuse its discretion in ruling the statements were inadmissible hearsay.

Fed. R. Evid. 803(24) renders admissible statements "not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness," if the court determines that several other requirements are met.

The district court ruled that the relevant portions of the affidavits of the four witnesses did not "have the indicia of trustworthiness" required by the "catch-all" provision. Fed. R. Evid. 803(24) "is not to be used as a new and broad hearsay exception, but rather is to be used rarely and in exceptional circumstances." Fong v. American Airlines, Inc., 626 F.2d 759, 763 (9th Cir. 1980). The district court did not abuse its discretion.

The affidavit of Craig A. Davidson was stricken by the district court because it was filed on the morning of the hearing on the Motion for Summary Judgment. The district court cited a local rule that affidavits must be filed within fourteen days after service of the motion. District courts may adopt local rules

covering filing deadlines for affidavits and those local rules govern, even if the deadlines differ from those provided for in the Federal Rules of Civil Procedure. Marshall v. Gates, 44 F.3d 722, 725 (9th Cir. 1995). The district court did not abuse its discretion in striking the affidavit.

The DeMarias next argue that the district court abused its discretion in denying their motion to obtain additional discovery. A Rule 56(f) motion must be made prior to the summary judgment hearing. Ashton-Tate Corp. v. Ross, 916 F.2d 516, 519-20 (9th Cir. 1990). Here, the motion was not made prior to the summary judgment hearing. It was not an abuse of discretion for the district court to deny the DeMarias' request for reopening of discovery.

The DeMarias moved the district court to reconsider its grant of summary judgment. The standard of review for a denial of a motion to reconsider is for abuse of discretion. School Dist. No. 1J, Multnomah County, Or. v. ACandS. Inc., 5 F.3d 1255, 1262 (9th Cir. 1993). In their motion for reconsideration, the DeMarias largely reargued what they had presented in their opposition to the Motion for Summary Judgment. The district court did not abuse its discretion.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

[Filed March 22, 1996]

ANTHONY M. DEMARIA, et. al., Plaintiffs, v. WASHINGTON COUNTY, et. al., Defendants.	Civ. No. 93-O249-S-BLW MEMORANDUM DECISION

I

INTRODUCTION

The Court has before it a Motion for Summary Judgment and a Motion to Strike filed by Defendants. The Court heard oral argument on March 22, 1996, and the Motions are now at issue. The Court will resolve the Motions after briefly reviewing the facts.

II

FACTS

In 1990, Anthony DeMaria moved to Weiser, Idaho with his sons Tony and John. Shortly after the DeMarias moved into their home, their neighbor Tom Sorensen began to harass and

threaten them. Anthony DeMaria recounts that in 1991, he "frequently called the Sheriff's Department to report Mr. Sorensen's threats, which included warnings that he wanted to hurt my son, Tony Jr., that he would 'kick my ass' and kill my family...." *See,* Affidavit of DeMaria at ¶6, p.3. In addition to the threats of physical harm, Tom Sorensen also used ethnic slurs to disparage Anthony DeMaria's Italian heritage.

When Anthony DeMaria first complained to the Washington County Sheriff's Department about Sorensen's harassment, he was visited by Deputy Sheriff Jim Nelson. DeMaria alleges that he heard Deputy Nelson ask Tom Sorensen "is that asshole [referring to DeMaria] next door causing you trouble?" *Id.* at ¶6, p.3. DeMaria alleges that Deputy Nelson treated him with "hostility," and ignored his complaints. *Id.* At the same time, Deputy Nelson would shake hands and laugh with Tom Sorensen, and appeared to be a good friend of the Sorensens.

On other occasions, DeMaria's complaints to the Sheriff's Department brought out Sheriff Mike Wadley. DeMaria asserts that Sheriff Wadley's visits were just like those of Deputy Nelson: Sheriff Wadley was scornful with DeMaria but warm and friendly with the Sorensens. DeMaria recites a conversation where Sheriff Wadley told him "I don't like you and I don't want you in my community." *Id.* at ¶16, p.6.

The affidavits submitted by the DeMarias are also filled with hearsay concerning racial slurs made by Sheriff Wadley and Deputy Nelson against the DeMarias. For example, the Affidavit of Randy Poston, a friend of the DeMarias, states that he heard Jerry Sullivan, a police dispatcher, say that he (Sullivan) had heard Sheriff Wadley and Deputy Nelson (1) refer to Anthony DeMaria as a "wop," and (2) state that they wanted to "get Tony out of town because he was a Sicilian and connected with the Mafia." *See,* Affidavit of Poston, ¶7, p.4. There is no affidavit from Jerry Sullivan; the record contains only affidavits from those who overheard Jerry Sullivan say these things. The deposition of Jerry Sullivan was taken, and

the DeMarias have submitted excerpts from that deposition. But the DeMarias have not cited any portion of the Sullivan deposition to support their claims that Defendants discriminated against them on the basis of their Italian heritage. The Defendants have filed a Motion to Strike the hearsay allegations from the affidavits, and the Court will address that Motion later in this decision.

On March 26, 1993, the DeMarias received a death threat by phone. The caller threatened to kill the entire DeMaria family. The DeMarias reported this to the Sheriff, but no action was taken.

The next day, March 27, 1993, Tony DeMaria, Jr. and the others were driving toward the DeMaria home. Tom Sorensen was driving in the opposite direction, and when he passed the DeMaria vehicle he shook his fist at Tony DeMaria who responded with "the finger."

Tom Sorensen turned his vehicle around, and followed Tony DeMaria to the DeMaria home. There, Tom, and his son Kevin, attacked Tony DeMaria. When Tony's brother, John, and his father came to his aid, Kevin Sorensen struck both Anthony and John with a club. Tom Sorensen then ran home and returned with a shotgun. The police arrived on the scene while Tom Sorensen was threatening the DeMarias with the gun.

The police talked to witnesses and confirmed that the Sorensens had assaulted the DeMarias, but no action was taken against the Sorensens. Anthony DeMaria claims that as a result of the beating he suffers from permanent low back pain, incontinence, and sexual impotency.

The DeMarias claim further that the Sorensens' harassment continued after the fight and was ignored by Sheriff Wadley and Deputy Nelson. This continuing harassment included incidents where the Sorensens allegedly set fires near the DeMaria home.

III

LITIGATION HISTORY

The DeMarias filed this suit against six named defendants: (1) Washington County; (2) three individual Washington County Commissioners; (3) Sheriff Wadley; and (4) Deputy Nelson. The original complaint contained three causes of action: (1) a claim under 42 U.S.C. §1985 that Sheriff Wadley and Deputy Nelson, knowing of the Sorensens' threats against the DeMarias, conspired to deprive the DeMarias of law enforcement protection; (2) a claim under 42 U.S.C. §1983 that Sheriff Wadley and Deputy Nelson improperly failed to arrest the Sorensens on March 27, 1993; and (3) a claim under 42 U.S.C. §1985 that Washington County, through the Commissioners, failed to properly train Sheriff Wadley and Deputy Nelson, and that Sheriff Wadley failed to properly train Deputy Nelson. Although the Complaint contained no claim under 42 U.S.C. §1986 in the sections specifically dealing with the three causes of action, a claim under §1986 was made in the Complaint's general allegations section. The parties appear to agree that the DeMaria have made a §1986 claim.

The defendants filed a Motion to Dismiss. The Motion was referred to Chief Magistrate Judge Mikel H. Williams who issued a Report and Recommendation recommending that the §1983 claim be dismissed, and that the DeMarias be allowed to amend their §1985 and§1986 claims. Chief Magistrate Judge Williams made a thorough analysis of the DeMaria's § 1983 claim that the Defendants violated the Due Process Clause by failing to protect the DeMarias from the Sorensens' harassment. Chief Magistrate Judge Williams cited the leading Supreme Court case, *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189 (1989), and its progeny from the Ninth Circuit, *Wood v. Ostrander,* 879 F.2d 583 (9th Cir. 1989), and *L.W. v. Grubbs,* 974 F.2d 119 (9th Cir. 1992). These cases define the narrow circumstances where the Due Process Clause requires the state to protect its citizens from danger from private parties. The cases hold that the state is not liable under

the Due Process Clause for protecting its citizens from dangerous private parties unless the state has affirmatively created the dangerous situation, or has limited--through incarceration or other means-- the citizen's ability to act in his own defense.

Chief Magistrate Williams concluded that the "Defendants did not create the situation in which the [DeMarias] were subject to the actions of third party Sorensens, nor did it limit the [DeMarias] freedom to act on their own behalf." , Report and Recommendation at p.7. He therefore recommended a finding that the DeMarias had no Due Process Clause claim. The DeMarias briefing and argument did not indicate that their §1983 claim was based on any constitutional violation other than a Due Process Clause violation. Therefore, Chief Magistrate Judge Williams recommended that the §1983 claim be dismissed.

After reviewing the Report and Recommendation, Chief Judge Lodge agreed. He independently reviewed the Due Process case law cited above, and came to the same conclusion that the Defendants had not created the harm and had no special relationship with the DeMarias that would trigger Due Process protections. But during oral argument before Judge Lodge, the DeMarias' counsel apparently made an oral motion to be allowed an opportunity to amend his complaint. Chief Judge Lodge relented, and granted the request. In his Order, he actually granted the Defendants' Motion to Dismiss, but also granted the DeMarias' oral motion to amend complaint. In making that ruling, Chief Judge Lodge made it clear that this was the last opportunity for the DeMarias to get it right:

> "The court takes no position on the ability of these plaintiffs to state cognizable civil rights deprivation actions. The court is not familiar with facts other than those facts alleged in plaintiffs' complaint and supporting declarations which the court has already held *are insufficient to state a cognizable claim*. The court invites the plaintiffs to make a

> thorough study of this area of the law and the cases cited by the court prior to the filing of any amended complaint by plaintiffs. And, the court cautions plaintiffs that a mere statement of the causes of action presently pled will result in dismissal with prejudice without leave to refile."

Order at p.12 (emphasis added).

The DeMarias did timely file an Amended Complaint. With regard to the §1983 claim, the DeMarias–in an attempt to circumvent the rulings of Chief Magistrate Judge Williams and Chief Judge Lodge–added allegations that the failure of Sheriff Wadley and Deputy Nelson to arrest the Sorensens after the March 27, 1993 fight emboldened the Sorensens to continue harassing the DeMarias thereafter, and thus "affirmatively placed the Plaintiffs in a position of danger."

The Defendants have now brought a Motion for Summary Judgment seeking to dismiss the entire Amended Complaint. The Court will address the Motion after briefly reviewing the legal standards governing the Motion.

IV

LEGAL STANDARDS GOVERNING SUMMARY JUDGMENT

The party moving for summary judgment has the burden of proving the absence of any genuine issue of material fact that would allow a judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). The evidence must be viewed in the light most favorable to the non-moving party, *Id.* at 255, and the Court must not make credibility determinations. *Id.* The trial judge must determine whether the evidence presented is such that a jury applying the proper evidentiary standard could reasonably find for either the plaintiff or the defendant. *Id.*

However, once the moving party demonstrates the absence of a genuine issue of material fact, the burden shifts to the non-moving party to produce evidence sufficient to support a jury verdict in her favor. *Id.* at 256-57. In meeting this burden, the non-moving party must go beyond the pleadings and show "by her affidavits, or by the depositions, answers to interrogatories, or admissions on file" that a genuine issue of material fact exists. *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986).

V

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

The Defendants seek summary judgment on all claims made by the DeMarias. The Court will turn first to the § 1983 claim since it is well-established that there can be no § 1985 or §1986 claim in the absence of a §1983 claim. *Caldeira v. County of Kauai,* 866 F.2d 1175, 1177 (9th Cir. 1989), *cert denied,* 493 U.S. 817 (1989).

In examining a §1983 claim, the Court must determine whether the Plaintiff has been deprived of a constitutional right. *Baker v. McCollan,* 443 U.S. 13 (1979). To resolve this issue, the Court "must isolate the precise constitutional violation with which the defendant is charged." *Id.* at 140.

The DeMarias have been less than precise about identifying the constitutional violation upon which they base their §1983 claim. From their Amended Complaint, briefing, and oral argument, it appears that they are claiming that Sheriff Wadley and Deputy Nelson violated the Due Process Clause. More specifically, the DeMarias assert that the officers failed to arrest the Sorensens after the March 27, 1993 fight, thereby affirmatively placing the DeMarias in a dangerous position, exposed to the continued harassment of the Sorensens.

In an effort to distance themselves from the weakness of the prior claims, the DeMarias assert in their briefing that

"Defendants affirmative conduct increased the danger the Sorensen's posed to them." *See* , Brief of DeMaria at p.9. This, and other changes to the original complaint, were the DeMarias response to Chief Judge Lodge's strict admonition that the amendments provide weight to a weak case that was on the verge of being dismissed.

After reviewing the Amended Complaint, the Court finds that the minor changes made to that pleading lack the substance required by Chief Judge Lodge. The case has not changed in any real way since it was analyzed by Chief Judge Lodge and Chief Magistrate Williams. And this Court's independent review of the Ninth Circuit case law leads the Court to agree with those Judges that the DeMarias have no Due Process Clause claim.

The definitive case on the Due Process issue is the Supreme Court case of *DeShaney* v. *Winnebago County Department of Social Services, supra*. There, a small boy was abused by his father numerous times during a two-year period. One final beating caused such extensive brain damage to the boy that he was permanently institutionalized. *Id.* at 93. The Winnebago County Department of Social Services (DS S) knew of the beatings that led to that final tragic incident. More specifically, DSS knew--prior to the final beating--that the boy had been hospitalized on at least three separate occasions with injuries consistent with abuse; that a DSS caseworker had observed many suspicious injuries during six mouths of home visits; and that just months before the final beating, the caseworker had been refused entrance into the boy's home. *Id.* at 192-93. Despite this knowledge, the DSS did nothing.

After the final beating, the boy's mother sued the DSS under §1983, claiming the DSS violated the Due Process Clause by "failing to intervene to protect [the boy] against a risk of violence at his father's hands of which they knew or should have known." *Id.* at 193. The District Court granted summary judgment to the DSS, and the Seventh Circuit and Supreme Court affirmed.

The Supreme Court dealt with the Due Process issue this way:

> "Nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause."

Id. at 195-97.

The Plaintiffs in *DeShaney* argued, however, that this was a special case because "the State knew that [the boy] faced a special danger of abuse at his father's hands, and specifically proclaimed, by word and by deed, its intention to protect him against that danger." *Id.* at 197. The Supreme Court rejected that argument. The Court held that no duty of protection arises under the Constitution unless "the State takes a person into its custody and holds him there against his will." *Id.* at 199-200. Elaborating on that holding, the Court stated that "[t]he affirmative duty to protect arises not from the State's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which it has imposed on his freedom to act on his own behalf." *Id.* at 200.

The Ninth Circuit took this holding in *DeShaney* one step further in *Wood v. Ostrander*, 879 F.2d 583 (9th Cir.1989) *cert. denied*, 498 U.S. 938 (1990). There, a police officer had pulled over a drunk driver whose passenger was Linda Wood. The officer arrested the driver, impounded the car, and stranded Wood at 2:30 a.m. in a high-crime area. Predictably, Wood was raped. The Ninth Circuit reversed a summary judgment for the police officer, finding serious questions whether, in *DeShaney*'s terms, the officer had limited Wood's "freedom to

act on [her] own behalf." *DeShaney*, 489 U.S. at 200.

The Circuit reached the same result in *L.W. v. Grubbs*, 974 F.2d 119(9th Cir. 1992), *cert. denied*, ___U.S.____113 S.Ct. 2442 (1993). There, a prison nurse was raped by a violent sex offender assigned to work with her by the state. The state knew that the offender was likely to rape again, but did not tell the nurse of his proclivities. The Circuit stated that the "danger creation" exception to *DeShaney* "necessarily involves affirmative conduct on the part of the state in placing the plaintiff in danger." *Id.* at 121. The Circuit found that the state "affirmatively created the dangerous suuation which resulted in [plaintiff's] assault," by placing a known rapist in a job where he would accompany a female nurse on rounds with no supervision. *Id.*

The Ninth Circuit recently summarized this case law by stating, "[i]n this Circuit, that duty [to assume responsibility for the public's safety] obtains not only when the victim is in custody, but also when the state has created the danger to which the victim is exposed." *U.S. v. Koon*, 34 F.3d 1416, 1447 (9th Cir. 1994), *cert. granted in part*, ___U.S. ___, 116 S.Ct. 39 (1995). This occurs, the Circuit held, when the victim is "placed in a dependent and helpless position...." *Id.* And from *Grubb* and *Wood,* it is clear that the state must "affirmatively create" the dangerous situation that places the victim in the dependent and helpless position

Assuming that the DeMarias' allegations are true, they do not rise to the level required by the Due Process Clause. Nothing in the record indicates that the Defendants affirmatively created any dangerous situation. The danger was affirmatively created by Sorensens. The DeMarias were never dependent and helpless. Assuming that Sheriff Wadley and Deputy Nelson ignored the DeMarias pleas for help, their passivity is not the "affirmative creation of a dangerous situation" required by the case law.

The DeMarias claim that Sheriff Wadley and Deputy

Nelson affirmatively created a danger by letting the Sorensens get away with outrageous physical and verbal abuse, thereby essentially encouraging that abuse. But this argument flies in the face of *DeShaney*. The county defendant in *DeShaney* let the abusive father get away with multiple beatings of his child. Certainly the abusive father could be said to have been emboldened by the county's "acquiescence-by-silence." But the Supreme Court dismissed the suit anyway, holding that the Due Process Clause was not violated when the "state functionaries ... stood by and did nothing when suspicious circumstances dictated a more active role for them." *Id.* at 203.

The DeMarias cite two cases from other circuits, both of which are distinguishable. In *Freeman v. Ferguson,* 911 F.2d 52 (8th Cir. 1990), the Plaintiffs asserted that the Chief of Police affirmatively prevented his officers from protecting the victim from an abusive ex-husband who was a close friend of the Chief. The Court did not directly hold that such allegations, if proven, would constitute a Due Process violation. Instead, the Court stated that since "we cannot determine from the current pleadings whether appellant's claims fall within [the *DeShaney* Due Process Clause protections] ... we find that appellant must be given the opportunity to amend her complaint before a conclusive ruling on this issue can be made in this case." *Id.* at 55.

The *Freeman* decision did state that *"DeShaney* does establish that the overall danger must at least be greater than it would be absent state action...." *Id.* Under that test, an officer like Sheriff Wadley or Deputy Nelson who fails to enforce the law is just like no officer at all, and the Due Process Clause is not implicated.

The second case cited by the DeMarias is *Dwares v. City of New York,* 985 F.2d 94 (2nd Cir. 1993). There, the Plaintiff was beat up by "skinheads" during a flag-burning rally while the police stood by and watched. The Complaint alleged that "the officers conspired with the 'skinheads' to permit the latter to beat up the flag burners with relative impunity, assuring the

'skinheads' that unless they got totally out of control they would no be impeded or arrested." *Id.* at 99. The Second Circuit found that the complaint asserted that the officers "indeed had made the demonstrators more vulnerable to assaults" by their collaboration with the "skinheads," and thus the action was not precluded by *DeShaney. Id.*

The facts in the present case are much different. Here the abuse started well-before any "official sanction" from the police. It may be that the Sorensens *continued* the abuse because they met no resistance from Sheriff Wadley, but *DeShaney* has made it clear that the Due Process Clause is not violated when "the state functionaries ... stood by and did nothing...." *DeShaney*, 489 U.S. at 203. In every case where an officer stands by and does nothing, a claim could be raised that the officer's inaction emboldened the criminal. But *DeShaney* has clearly foreclosed these claims.

In conclusion, the Court finds that the DeMarias' claim that the Defendants violated the Due Process Clause is without merit. This should result in the dismissal of the DeMarias' §1983 claim because the DeMarias have never argued that the claim was based on anything other than a Due Process violation.

It may be, however, that the Amended Complaint could be read to also assert that the §1983 claim is based on a violation the Equal Protection Clause. Here, the DeMarias' argument would be that because of their Italian heritage, the Defendants did not afford them the same police protection given to other citizens.

The Court is concerned here, however, because in the numerous rounds of briefing and argument before Judges Lodge and Williams, and now before this Court, the DeMarias have never asserted that their § 1983 claim is based on an Equal Protection violation. In the oral argument before this Court, defense counsel brought up this very point in his opening argument, and the DeMarias' counsel failed to make any specific argument that the §1983 claim was based on Equal

Protection. The Court therefore has no briefing or oral argument from the DeMarias' counsel defining and supporting an Equal Protection claim. It certainly appears to the Court that the DeMarias have waived any Equal Protection argument they may have had under §1983. But in the interests of reaching the merits of the issue, the Court will go on to rule that even if the DeMarias have not waived their Equal Protection claim, the claim must nevertheless be dismissed by summary judgment.

In DeShaney, the Supreme Court noted that "the State may not, of course, selectively deny its protective services to certain disfavored minorities without violating the Equal Protection Clause." *DeShaney,* 489 U.S. 197 at n. 3. The Ninth Circuit has held that a §1983 claim can be based on an Equal Protection claim that a citizen was denied effective police protection because he was an Italian. *Benigni v. City of Hemet,* 879 F.2d 473 (9th Cir. 1988). In *Benigni,* the Circuit held that "[a]n Equal Protection claim based on selective law enforcement activities is judged according to ordinary standards and the plaintiff must show both a discriminatory effect and a discriminatory motivation." *Id.* at 477.

What evidence is there that the Defendants in this case had a discriminatory motivation? The DeMarias' affidavits are filled with hearsay statements on this issue. It is well-established that an affidavit filed in a summary judgment proceeding must "set forth facts as would be admissible in evidence...." *Fed.R. Civ.P. 56(e).* Hearsay must be stricken. *Courtney v. Canyon Television*, 899 F.2d 845 (9th Cir. 1990).

In response to the hearsay contained in the DeMarias' affidavits, the Defendants have filed a Motion to Strike. The Motion is well-taken. For example, Anthony DeMaria's affidavit contains statements that he heard Mark and Jerry Sullivan say that (the Sullivans) had heard that the Sheriff's Department thought DeMaria was in the Mafia and that they disliked Italians. *See,* Affidavit of DeMaria at ¶s 8, 14. The same allegations are made in the Affidavit of Randy Poston. *See,* Affidavit of Poston at ¶7, p.4. There is no affidavit of Jerry or Mark Sullivan. In fact,

the depositions of the Sullivans were taken, but the DeMarias have not cited the Court to any provision of those depositions to support their claims of discrimination.

These statements about what the Sullivans said are clearly hearsay for which no exception exists in the Federal Rules of Evidence. The DeMarias claimed at oral argument that the statements of Jerry Sullivan were admissions of a party opponent and thus did not constitute hearsay under Rule of Evidence 801(d)(2). But this argument depends completely on a finding that Jerry Sullivan was an employee of Washington County at the time he made the statements that the Sheriff's Department was biased against the DeMarias because of their Italian heritage. Counsel agreed that Jerry Sullivan did not become an employee of Washington County until November, 1992. The comments contained in the Affidavit of Randy Poston all appear to have occurred prior to or during concerts occurring in September and October 1992. But even that is unclear, because the Affidavits of both Poston and Anthony DeMaria do not provide the dates when the alleged conversations involving racial slurs occurred. It is well-established that affidavits fled in summary judgment proceedings must provide the foundational facts necessary to make the testimony contained in the affidavits admissible. Here, the DeMarias have failed to provide the foundation required by Rule 80l(d)(2).

The DeMarias also appear to rely on Rule 801(d)(1)(A), claiming that Sullivan's deposition testimony is inconsistent with the statements of Poston and DeMaria and thus is admissible as an inconsistent statement. The foundational requirements for admitting inconsistent statements under Rule 801(d)(1)(A) are set forth in Rule 613(b). *U.S. v. Chavez,* 979 F.2d 1350 (9th Cir. 1992); 28 Wright & Gold, *Federal Practice and Procedure,* §6203 at p.511(1993). Rule 613(b) requires that the declarant be given an opportunity to explain the inconsistency. The Court has the deposition excerpt of the Sullivan deposition, and it is clear that Sullivan was never given any opportunity to explain an inconsistency. Because Rule 613(b) was not complied with, Rule 801(d)(1)(A) is inapplicable.

In addition, Rule 801(d)(l)(A) is only applicable when the declarant "testifies at trial subject to cross-examination...." *U.S. v. Tafollo-Cardenas,* 897 F.2d 976 (9th Cir. 1990). Here, Sullivan has never testified at trial and thus the Rule is inapplicable for that reason as well.

The Court recognizes that the Ninth Circuit has recently held that when a District Court refuses to admit evidence under Rule 801(d)(1)(A), the Court must also consider whether the evidence is admissible under Rule 803(24), the catch-all provision. *U.S. v. Valdez-Soto,* 31 F.3d 1467(9th Cir. 1994). Here, the Court finds that the evidence does not have the indicia of trustworthiness required by Rule 803(24).

The Defendants' Motion to Strike must therefore be granted, and the hearsay stricken. When the hearsay is removed from the affidavits, there is no evidene in the record indicating that the Defendants had a discriminatory motivation. Thus, even if the DeMarias could be allowed to raise at this late date an argument that their § 1983 claim was based an Equal Protection violation, there is no competent evidence in the record to support that claim.

For all of these reasons, the Defendants' Motion for Summary Judgment must be granted dismissing the DeMarias' §1983 claim. Without a §1983 claim, the DeMarias' §1985 and §1986 claims must be dismissed as well. The Court will enter a separate Judgment to that effect.

Dated this 22nd day of March, 1996.

/s/ B. Lynn Winmill
B. LYNN WINMILL
UNITED STATES DISTRICT COURT

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

[Filed June 6, 1996]

ANTHONY M. DEMARIA, et. al., Plaintiffs, v. WASHINGTON COUNTY, et. al., Defendants.	Civ. No. 93-0249-S-BLW MEMORANDUM DECISION

I

INTRODUCTION

The Court has before it a number of post-judgment motions in this action. The Court entered Summary Judgment on March 22, 1996, and the post-judgment matters include two Motions for Reconsideration, a Petition for Attorney Fees, a Second and Third Motion to Strike, and a Cost Bill. The Court will resolve first the Motions to Reconsider.

II

MOTIONS TO RECONSIDER

The DeMarias have filed two Motions to Reconsider,

seeking reconsideration of the Court's decisions excluding certain evidence and granting summary judgment to defendants. The Court will not repeat a discussion of the facts, but will simply incorporate by reference its earlier Memorandum Decision filed March 22, 1996.

The Court will turn first to that portion of the Motions where the DeMarias request relief under Federal Rule of Civil Procedure 56(f). The DeMarias claim that "[t]he lack of competent and diligent legal representation, the accelerated schedule for completion of discovery and hearing of dispositive motions, and defendants' alleged concealment of evidence and interference with witnesses all suggest that relief should be granted to plaintiffs under Rule 56(f)." *See, Reply Brief of DeMarias at p.6-7.*

There is no doubt that the counsel retained by the DeMarias early in the case did very little to advance this matter; one of those early counsel was disbarred and another had significant personal problems. The DeMarias' present counsel--an attorney residing in California--came into this case on July 7, 1995, when he filed his application for admission pro hac vice with this Court. He has been an effective advocate from that date to the present.

At the time counsel's pro hac vice application was filed, trial was set for March 12, 1996. The DeMarias filed a motion to continue the trial, and a hearing was held on that motion on January 16, 1996. One day later, on January 17, 1996 the Court issued an Order granting the motion and continuing the trial to April 30, 1996. In addition, the Order set up a hearing on the Defendants' Motion for Summary Judgment for March 21, 1996.

During the two month period between the Order setting the summary judgment hearing and the hearing itself, the DeMarias never filed a Rule 56(f) motion. The hearing was held on March 22, 1996. During the hearing, counsel for the DeMarias never made an oral motion citing Rule 56(f). He did,

at one point, request the Court to "defer its final ruling until we do more discovery on this...." But counsel devoted only a single sentence to this request, and there was no follow-up discussion specifically identifying the discovery that needed to be done; the reasons why this discovery was not done earlier; and how the discovery might preclude the issuance of a summary judgment.

It is true that the failure to file a formal Rule 56(f) motion may not be fatal to the DeMarias' request. *Conkle v. Jeong,* 73 F.3d 909, 914 (9th Cir. 1995). But there is no doubt that to obtain relief under Rule 56(f), the DeMarias have the burden of showing that they have diligently pursued previous discovery, and that the additional discovery sought will preclude the issuance of a summary judgment. *Qualls v. Blue Cross of California*, 22 F.3d 839, 844 (9th Cir. 1994). Despite being given two months to prepare for the summary judgment hearing, the DeMarias never made the showing required by Rule 56(f) prior to the issuance of the summary judgment. Now, in the Motions to Reconsider, the DeMarias for the first time submit affidavits and other evidence supporting their claim for a rule 56(f) continuance. The Ninth Circuit has clearly ruled that these submissions must be made before the summary judgment is heard and decided. *Ashton-Tate Corp. v. Ross,* 916 F.2d 516, 519-20 (9th Cir. 1990). The Court will therefore deny those portions of the Motions to Reconsider that seek a Rule 56(f) continuance.

The Court turns next to the DeMarias' argument that the Court ignored a key Ninth Circuit case on the due process claim. The DeMarias assert that *Balistreri v. Pacifica Police Dept.,* 901 F.2d 696, 700 (9th Cir. 1990) held that "plaintiffs may preserve due process claims under §1983 if they plead or prove that defendants ... did anything to ratify, condone or in any way instigate the abuses of the private actor." *Brief of DeMaria at p.* 3 (*quotations omitted*). But a close reading of *Balistreri* indicates that the DeMarias read too much into that case and that in fact the case supports the grant of summary judgment.

In *Balistreri,* the plaintiff was severely beaten by her

husband. The police officers who responded to her call were insulting to her and stated that she deserved the beating. The officers refused to arrest the husband. Thereafter, the husband continued to abuse the plaintiff, and at one point even threw a firebomb into her house. This abuse continued even after the plaintiff obtained a restraining order. The plaintiff alleged that the police would set the husband free after every incident, and continued to blame her for the abuse. She sued the police for, among other things, violation of her due process rights.

The district court granted summary judgment to the police. In that decision, the district court ruled that the officers did not "'ratify, condone or in anyway instigate' the actions taken by the former husband against plaintiff." *Balistreri v. Pacifica Police Dept.*, 656 F.Supp. 423, 425 (N.D.Cal. 1987) (quoting *Estate of Gilmore v. Buckley*, 737 F.2d 714, 722 (1st Cir. 1986). It is important to note at this point that the *DeShaney* decision had not yet been issued by the United States Supreme Court, and would not be published until 1989.

The plaintiff appealed and the Ninth Circuit initially reversed. *Balistreri v. Pacifica Police Dept.*, 855 F.2d 1421 (9th Cir. 1988). The Circuit held that a special relationship may have been created by the police's awareness of the abuse in combination with the restraining order which created an affirmative duty to protect.

But shortly after the Circuit's decision, the Supreme Court issued *DeShaney*. The Circuit withdrew its decision and issued a new decision. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696 (9th Cir. 1990). Once again the Circuit cited the district court language regarding the failure of the plaintiff to allege that the officers ratified, condoned, or instigated the abuse. *Id.* at 700. But the Circuit was simply quoting the district court's factual finding, not establishing a new, more lenient, *legal standard* authorizing due process claims every time a state actor "condoned" private abuse. Far from loosening the standards, the Circuit recognized that the *DeShaney* case "limited" the circumstances giving rise to a due process

violation. *Balistreri,* 901 F.2d at 700. That is why the Circuit withdrew its earlier opinion, and issued a new opinion relying on *DeShaney* to affirm the district court's grant of summary judgment to the police officers.

In this new opinion, the Circuit held that the police committed no due process violation when they refused to arrest the abusive husband on numerous occasions, and were "rude, insulting, and unsympathetic" to the plaintiff/wife. *Id.* at 698. That is very similar to the present case where the DeMarias allege that the defendants failed to arrest the abuser, and were rude, insulting, and unsympathetic to the DeMaria family. *Balistreri* is actually stronger authority for defendants than the DeMarias.

There was no holding in *Balistreri* that conduct ratifying or condoning private abuse constitutes a due process violation. The district court opinion–and the *Buckley* case which it quoted –were decided prior to *DeShaney*. To the extent that those decisions are inconsistent with *Deshaney,* they are no longer useful or authoritative. No Ninth Circuit decision since *Balistreri* has ever adopted the standard advocated by the DeMarias, and for good reason: *DeShaney* is the standard. Cases from other Circuits that may expand *DeShaney* are not determinative in the Ninth Circuit.

The DeMarias argue that the record shows that the defendants did more than simply stand by and watch. The DeMarias assert that the record shows "fraternization with the perpetrator by a senior law enforcement officer and the officer's deliberate or callous indifference to the victim...." *Brief of DeMaria at p.4.* This is enough, according to the DeMarias, to establish liability.

There is, however, no Ninth Circuit authority holding that fraternization and deliberate indifference are enough to establish liability. As the Court pointed out in its initial decision, the Ninth Circuit has recently held that the duty to protect citizens arises either when the citizen is in custody or "when the

state has created the danger to which the victim is exposed." *U.S. v. Koon,* 34 F.3d 1416, 1447 (9th Cir. 1994), *cert. granted in part,* 116 S.Ct. 39 (1995). This occurs, the Circuit held, when the victim is "placed in a dependent and helpless position...." *Id.* It is also clear that the state must "affirmatively create" the dangerous situation that places the victim in the dependent and helpless position. *L.W. v. Grubbs,* 974 F.2d 119 (9th Cir. 1992), *cert. denied,* 113 S.Ct. 2442 (1993). These standards are not satisfied in this case even assuming that the record contains evidence that defendants fraternized with Sorensen, and that defendants knew of Sorensen's abuse and yet were deliberately indifferent to the DeMarias' plight. For all of these reasons, the Court rejects the DeMarias' claim that the Court employed the wrong legal standard in dismissing the due process claim.

The Court turns next to the DeMarias' equal protection claims. The DeMarias concede in their reply brief that the Court did in fact recognize that their complaint asserted an equal protection claim under §1983. The Court's ruling dismissing that claim was based in part on the DeMarias' failure to go beyond the one-sentence allegation in the complaint and respond--as required by *Celotex Corp. v. Catrett,* 477 U.S. 317 (1986)–to defendants' argument that the entire § 1983 claim must be dismissed. In this motion to reconsider, the DeMarias do not point the Court to any briefing or argument where they raised a §1983 equal protection claim or gave the Court any guidance on the legal standards applicable to such a claim. It was the Court's own research that uncovered *Benigni v. City of Hemet*, 87 F.2d 473 (9th Cir.1988), cited in the Court's Memorandum Decision, that discussed the legal standards applicable to a §1983 equal protection claim.

Nevertheless, the Court reached the merits of the equal protection claim and found a lack of admissible evidence to support the claim. This brings the Court to a review of the DeMarias' evidentiary objections. At the conclusion of the March 22, 1996, hearing, the Court granted defendants' oral Motion to Strike the Affidavit of Craig Davidson. That affidavit was not filed until the morning of the hearing. The Court's Local Rule

7.1(a)(2) requires that affidavits be filed fouteeen days after service of the motion, and Federal Rule of Civil Procedure 56(c) provides that the affidavits must be filed "prior to the day of the hearing...."

While at first glance there may appear to be a conflict between the Court's Local Rules and Rule 56(c), the Ninth Circuit has reconciled these rules. In *Marshall v. Gates*, 44 F.3d 722, 725 (9th Cir. 1995), the Circuit held that the district courts are free to adopt local rules covering the filing deadlines for affidavits, and that those local rules govern.

The Circuit went on to hold that the district court must be careful not to grant a summary judgment as a sanction for failure to comply with a local rule. *Id.* In that case, the exclusion of the affidavit on racism left the Court with an empty record on the racism issue since the moving party had not briefed or addressed the racism issue in any way. Thus, the Circuit found that the district court must have awarded summary judgment as a sanction for the plaintiff's failure to follow the local rule, and the Circuit reversed that decision.

Here, the DeMarias have not only failed to comply with Local Rule 7. 1(a)(2), but have also failed to comply with Rule 56(c). In addition, the record here is much fuller than it was in *Gates;* the exclusion of the Davidson affidavit does not leave the Court with an empty record. The Davidson affidavit purports to indicate that the Sheriff's Department and City Police Department had the DeMarias under surveillance for alleged methamphetamine production. With the exclusion of that affidavit, the record contains denials by officers that any such surveillance took place. *See, e.g. Deposition of Wadley at p. 137.*

The DeMarias also claim that Mark Sullivan was somehow associated with the Sheriff's Department. It is undisputed that Mark Sullivan was never employed by the Sheriff's Department; he was instead employed by the Weiser Police Department. Nevertheless, the DeMarias seek to attribute

to the Sheriff's Department certain statements made by Sullivan on the ground that he was part of a combined team of county and city law enforcement officers who were conducting surveillance of the DeMarias. The DeMarias assert that Sullivan, as a member of this combined team, was acting as an agent of the Sheriff's Department, and thus any statements by him constitute admissions of the Sheriff's Department.

There is, however, no competent evidence of any "combined forces" surveillance, and no competent evidence that Mark Sullivan was ever acting as an agent of the Sheriff's Department. The DeMarias have the burden of proving that an agency exists in order to admit Sullivan's statements against the Sheriff's Department. *Merrick v. Farmers Insurance Group,* 892 F.2d 1434 (9th Cir. 1990). That burden *has* not been carried.

In addition, the Court applied the civil standard in evaluating the evidence under Federal Rule of Evidence 801(24). The Court cited the *Valdez-Soto* case simply to recognize the Ninth Circuit's direction that Rule 801(24) be considered. That point was clearly made in the Memorandum Decision, and thus the Court finds no need to change any portion of that decision.

The Court has examined the other assertions of the DeMarias and finds that they are without merit. The Court will therefore deny the Motions to Reconsider.

III

PETITION FOR ATTORNEY FEES

The defendants seek attorney fees under 42 U.S.C. §1988(b) which authorizes an award of fees to a prevailing defendant when the plaintiff's action was meritless and pursued frivolously. *Franceschi v. Schwartz*, 57 F.3d 828 (9th Cir. 1995). The Court has examined the entire record, and cannot find that this action was meritless or pursued frivolously. The Petition for Attorney Fees shall therefore be denied.

IV

SECOND AND THIRD MOTIONS TO STRIKE

The Second and Third Motions to Stike seek to strike affidavits submitted only with regard to the attorney fees issues, not the reconsideration issues. The Court finds the affidavits proper in that they are not offered for their truth but instead are 0ered to show what counsel John DiNapoli was working with when he pursued this case. While the affidavits would clearly be inadmissable on any issue regarding the Motion to Reconsider, counsel John DiNapoli has specifically stated that he is only offering the affidavits on the attorney fees issues, and the Court will allow them for that limited purpose. The Court will therefore deny the Second and Third Motions to Strike.

V

COST BILL

The Court has examined the entire record concerning the Cost Bill and finds that the Defendants shall have as costs from the Plaintiffs the sum of $2,026.85.

DATED this 6th day of June, 1996.

/s/ B. Lynn Winmill
B. LYNN WINMILL
UNITED STATES DISTRICT COURT

APPENDIX D

NOT FOR PUBLICATION

[Filed December 31, 1997]

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ANTHONY M. DEMARIA and CATHY L. DEMARIA, husband and wife; TONY DEMARIA, JR.; and JOHN JOSEPH DEMARIA, by and through ANTHONY M. DEMARIA, Guardian Ad Litem, Plaintiffs/Appellants, v. WASHINGTON COUNTY; WASHINGTON COUNTY BOARD OF COMMISSIONERS DON STEPHENS, MILDRED HORTON, RONALD POUND; JIM NELSON and MICHAEL WADLEY; JOHN DOES 1 THROUGH 10; and WASHINGTON COUNTY by and through the SHERIFF'S DEPARTMENT OF WASHINGTON COUNTY, Defendants–Appellees	No. 96-35851 ORDER

Before: SKOPIL and TROTT, Circuit Judges, and ROLL, District Judge.*

The panel as constituted above has voted to deny the petition far rehearing. Judge Trott has voted to reject the suggestion for rehearing en banc. Judges Skopil and Roll so recommend.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

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* The Honorable John McCarthy Roll, United States District Judge for the District of Arizona, sitting by designation.